LIM AH HUN

v.

PENDAFTAR HAKMILIK TANAH, PULAU PINANG & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING MOTION NO. 25-2-90]
18 MAY 1990

LAND LAW: *Applicant bona fide purchaser for value - No notice of fraud or improper dealing - Registrar's caveat - Whether person aggrieved - Exercise of Registrar's discretion - Sections 320, 321, 418 National Land Code.*

Upon execution of a sale and purchase of a land agreement entered into between the applicant, L and D Co. (the registered proprietors), L paid to D Co.'s solicitors 10% of the purchase price; L's solicitors subsequently entered a private caveat on the register document of title. On payment of the balance of the purchase price and after execution of the relevant forms under the National Land Code (NLC), L's solicitors tried to register the documents but were unable to do so due to the existence of a Registrar's caveat. D Co's solicitors requested the cancellation of this caveat but the Registrar refused advising that the permission of the caveator was needed.

This is an appeal under s. 418 of the NLC and is based on the ground that L, as a *bona fide* purchaser for value of the said property had no notice of any purported fraud or improper dealing in respect of the said property and that the Registrar had therefore wrongly exercised her powers under s. 320(1) of the NLC. An action had been commenced by the 2nd defendant and his sister against D Co.

Held:

[1] Reading ss. 321(3)(c) and 418 of the NLC, L could bring this appeal as he, being the beneficial and equitable owner of the said property, was a "person aggrieved" under s. 418(1).

[2] Based on the facts of this case, the Registrar possessed sufficient material to exercise her discretion to enter the Registrar's caveat. However, in view of the subsequent information which was gleaned from the civil proceedings between the 2nd defendant and D Co., the information which the Registrar had earlier acted on was misleading and no longer valid.

[Applicant's appeal allowed. Registrar's caveat cancelled]

Cases referred to:
Eng Mee Yong & Ors. v. V.Letchumanan [1979] 2 MLJ 212
Re Taupo Totara Timber Company Limited [1943] NZLR 557
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1974] 2 MLJ 45

Legislation referred to:
National Land Code 1965, ss. 320(1)(a), 321(3)(b), (c), 418(1)

Other source referred to:
Registrar's Caveat Amended, [1980] by Wong Kim Fatt, 1 MLJ vii at p. viii

For the applicant - Tan Phock Kin; M/s. Thillaimuthu & Phock Kin
For the 1st respondent - Asmadi bin Hj. Asnawi; Pejabat Penasihat Undang-undang Negeri
For the 2nd respondent - Anwar Raja; M/s. Shaik Anwar Raja

JUDGMENT

Mohamed Dzaiddin J:

This is an appeal brought by the applicant by way of notice of originating motion under s. 418 National Land Code against the decision of the Registrar of Titles, Penang made on 22 January 1990 in refusing to cancel the Registrar's caveat Jilid No. 26 Folio 199 entered on the register document of title to a piece of property known as Lot No. 1278 T.S. 9W, North East District, Penang ('the said property') on 3 December 1989.

This appeal is based on the ground that the Registrar had wrongly exercised her powers under s. 320(1) National Land Code bearing in mind that, the applicant, as a *bona fide* purchaser for value of the said property had no notice of any purported fraud or improper dealing in respect of the said property.

The Facts

On 24 August 1989 the applicant entered into an agreement with Delima Suria Sdn. Bhd., the registered proprietors to purchase the said property for RM180,000. Upon the execution of the purchase agreement, the applicant paid to the vendor's solicitors, K. Vijaya & Co. a deposit of RM18,000 being 10% of the purchase price. On 8 September 1989 the applicant's solicitors entered a private caveat on his behalf on the register document of title to the said property. Then, on 21 November 1989, the applicant paid the balance of the purchase price after both parties had executed the transfer form in Form 14A National Land Code. However, when the applicant's solicitors presented the documents to the Land Office, Penang, for registration they discovered the existence of the Registrar's caveat registered on 3 December 1989. They then informed the vendor's solicitors about the Registrar's caveat on the said property. On 22 December 1989, the vendor's solicitors wrote to the Registrar requesting her to cancel the said caveat. On 22 January 1990, the Registrar replied stating that it could not be cancelled without the permission of the caveator.

At the outset of this proceeding, Encik Anwar Raja, Counsel for the 2nd respondent raised a preliminary point which I shall deal first. He submitted that the applicant was not a proper party to bring this appeal because he is not the registered proprietor of the said property. Counsel relied on s. 321(3)(b) National Land Code.

Section 321(3) states:

> A Registrar's caveat shall continue in force until it is cancelled by the Registrar:
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> (a) of his own motion; or
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> (b) on an application in that behalf by the proprietor of the land affected; or
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> (c) pursuant to any order of the Court made on an appeal under s. 418 against his decision to enter the caveat, or his refusal of any application for its cancellation under para. (b).

Clearly, from the above subsection, the Registrar's caveat may be cancelled in any of the three ways: (i) either on his own motion, or (ii) on the application made by the registered proprietor, or (iii) pursuant to order of Court on appeal under s. 418 against his decision to enter a caveat or his refusal made in that behalf by the proprietor. In the instant case, sub-paragraph 3(c) is material because this paragraph refers specifically to an appeal under s. 418. Now, subsection (1) of s. 418 reads:

> Any person or body aggrieved by any decision under this Act of the state director, the Registrar or any land administrator may, at any time within the period of three-months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

Therefore, in the light of s. 418, the applicant comes within subsection (3)(c). On the facts, the applicant, being the beneficial and equitable owner of the said property, is an "aggrieved person" within the meaning of s. 418(1) National Land Code. Thus, under s. 321(3)(c) the Registrar can cancel the Registrar's caveat pursuant to an order of Court made under s. 418 by any person aggrieved by the decision of the Director, Registrar or any land administrator.

Section 320(1)(a) National Land Code enacts that subject to subsection (2), a Registrar's caveat may be entered in respect of any land wherever such appears to be necessary or desirable for the prevention of fraud or improper dealing:

> In determining whether or not to exercise the power conferred upon him by the section, the Registrar can only act upon such information as is available to him. This will consist of what is registered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by whoever has requested him to exercise his power to enter a Registrar's caveat (per Lord Diplock in *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44 at p. 47).

Encik Wong Kim Fatt in his article "*Registrar's Caveat Amended*" in 1980 1 MLJ vii at p. viii further stated that before the Registrar exercises his power of entry, he must be satisfied objectively with the information and/or facts supplied to him by any proper applicant. The request for entry may be made by letter to the Registrar, or may require the information and/or facts to be verified by statutory declaration. If the Registrar is doubtful whether he should comply with or reject the application, he may seek the legal opinion of the State Legal Adviser. In the present case, what is the information available to the Registrar which he acted upon when registering the Registrar's caveat? Puan Habibah bte. Abdul Hadi, the Deputy Director of Land Titles, Penang deposed in her affidavit dated 14 February 1990, that after she received a letter from the 2nd defendants solicitors dated 3 December 1989, she acted accordingly in order to prevent any further dealings over the said property. The said letter was accompanied by a police report. Further, it mentioned that a Court action was in the process of being taken by the 2nd respondent concerning the said property. I pause here to state that an action had been commenced by the 2nd respondent and his sister against the vendor, Delima Suria Sdn. Bhd. and its managing director, Mohamed Tahir bin Sultan concerning the said property in the Penang High Court (Civil Suit No. 22-63-90). I shall, however, deal with the facts of this civil action in a short while.

According to Puan Habibah, based on the solicitor's letter and the police report (Datuk Keramat Police Report No. 3335/89) lodged by the 2nd respondent against the vendor and Mohamed Tahir bin Sultan alleging a fraudulent transfer made by them to the applicant, she concluded that she was satisfied that there was sufficient and valid ground for her to exercise her powers under s. 320(1)(a) National Land Code to prevent fraud or improper dealing. Encik Asmadi, Federal Counsel, for the 1st respondent, submitted that the Registrar had acted in good faith when she registered the said caveat. She had carefully examined the solicitor's letter as well as the police report before caveating the said property. These documents were sufficient for her to arrive at her decisions. Relying on the authorities in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 PC and *Re Taupo Totara Timber Company, Limited* [1943] NZLR 557, Counsel submitted that this Court should not interfere with the Registrar's exercise of her discretion unless her act to enter the Registrar's caveat was clearly wrong. Finally, Counsel submitted that the Registrar's caveat should remain because there was a serious question to be tried affecting the said property.

Based on the information available to the Registrar I am of opinion that she exercised her discretion to enter the Registrar's caveat correctly. The information in the solicitors' letter and the police report constitutes sufficient material for her to suspect that there was something "hanky panky" going on concerning the said property.

However, in view of the subsequent information emerging regarding the true position of the dispute between the registered proprietor and the 2nd respondent as pleaded in Penang High Court Civil Suit No. 22-63-90, can this Court now, in the exercise of its discretion, reverse the earlier decision? In my opinion, the case of *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1974] 2 MLJ 45 provides the answer. There, the Federal Court in allowing the appeal of Temenggong Securities against the decision of the High Court held that the vendors (Li-Ta) having parted with their interest in the said land to the appellant were bare trustees and had no interest in the land over which a valid caveat would be lodged. This was because although Li-Ta were judgment debtors of the Government, after 19 December 1972 (date judgment obtained) Li-Ta no longer had interest in the said land. As stated by Lord Diplock in the Privy Council decision at p. 47:

> Upon appeal the Federal Court did not deal specifically with the general proposition accepted by Pawan Ahmad J. They allowed the appeal upon a narrower ground arising on the particular facts of the instant case - *viz.* that by the time the Registrar's caveat was entered Li-Ta had already ceased to have any interest in the land that was capable of being made available in execution to satisfy its judgment debts, since on completion of the contract of sale on 22 September 1972, and payment of the purchase price by Temenggong Li-Ta had parted with all beneficial interest in the land and held the registered title as bare trustee for the purchaser.

Thus, the appeal against Pawan Ahmad J's decision was allowed by the Federal Court because of the change of circumstances affecting the ownership of the property between the date of sale by the vendors, Li-Ta and the date of judgment against them.

In Civil Suit No. 63 of 1990, the case is brought by the 2nd respondent with his sister, Zainab Bee Bte. Sultan against the vendor, Delima Suria Sdn. Bhd. and Mohamed Tahir bin Sultan. The plaintiffs claim for the following reliefs:

a) An injunction restraining the defendants by themselves their agents or otherwise from utilizing all the proceeds of the sale of the property known as Lot No. 1278 T.S. 9W, Pulau Pinang until the trial of this suit;

b) an order restraining the defendants' solicitors M/s. Syarikat K. Vijaya of Suite No. 403, 4th Floor, Penang Chinese Town Hall, 22 Pitt Street, 10200 Penang from releasing to the defendants all the proceeds of the sale of property known as Lot No. 1278 T.S. 9W, Pulau Pinang until the trial of this suit;

c) an order that the defendants do pay the plaintiffs 1/3rd share each out of the total proceeds of the sale of property known as Lot No. 1278, T.S. 9W, Pulau Pinang;

d) an order that a reputed and certified public accountant be appointed to prepare audited accounts of the 1st defendant for the period 2 August 1984 to date of filing of this writ and thereafter to declare dividends and other benefits due to the plaintiffs from the defendants.

By their statement of claim, the plaintiffs who were the registered co-owners of the said property together with the 2nd defendant, each having a third undivided share alleged that at the request of the 2nd defendant, the co-owners agreed to charge their shares of the said property to Hong Kong & Shanghai Bank as security for a loan given by the bank to the

1st defendant, Delima Suria Sdn. Bhd. To facilitate the loan transaction, the plaintiffs gave their powers of attorney to the 2nd defendant, the person in control of the 1st defendant. The plaintiff further stated that on 2 August 1984, they transferred their respective shares to the 1st defendant for the purpose of the bank loan. However, since 2 August 1984, the plaintiffs alleged that they had been denied their rights as shareholders of the 1st defendant because the 2nd defendant had refused to inform them the true state of affairs of the 1st defendant. Finally, when the plaintiffs made a search at the registry of titles, Penang on 22 November 1989, they were informed that the said property had been sold to the applicant for RM180,000, where a deposit, RM18,000 had already been paid to the defendants. The plaintiffs maintained that they never gave consent to the defendants to sell the said property to anyone. It is lastly pleaded that since 2 August 1984, the plaintiffs had not been given any dividend or had derived any benefits from the 1st defendant, Delima Suria Sdn. Bhd.

From the statement of claim, it is clearly seen that the cause of action is not founded on fraud or allegation of improper dealings in respect of the said property. Nor are they claiming for the return of the said property. The plaintiffs' claim is for the entitlement of their shares in the proceed of sale of the said property and until this claim is determined by the Court, they pray for a restraining order against the release of the said sum of RM180,000 to the defendants. Looking at the averments and allegations in the statement of claim, they appear to be totally unrelated to the information stated in the solicitor's letter to the Registrar and the allegations in the police Report No. 3335/89.

Therefore, based on the facts as gathered from the statement of claim in Civil Suit No. 63 of 1990, it is my finding that the information supplied by the 2nd respondent to the Registrar in support of his application and upon which information the Registrar had acted upon in registering the Registrar's caveat with respect to the said property was misleading and is no longer valid. On the other hand, these new facts seems to show no improper dealing at all concerning the said property. In my view, had the Registrar been informed of the true facts of the plaintiffs' claim against the defendants she would not have come to her conclusion and exercised her discretionary powers under s. 320(1)(a) National Land Code. Hence, in view of the plaintiffs' action in Civil Suit No. 63 of 1990, the Registrar's caveat dated on 3 December 1989 can no longer remain. In the result, I allow this appeal and direct that the said Registrar's caveat be cancelled forthwith. In addition, I make an order that the costs of this appeal be paid by the 2nd respondent to the applicant to be taxed by Penolong Kanan Pendaftar. The prayer for damages is disallowed.

Also found at [1990] 2 CLJ 640